

“Blurred Lines” Means Changing Focus: Juries Composed of Musical Artists Should Decide Music Copyright Infringement Cases, Not Lay Juries

ABSTRACT

The verdict in Williams v. Bridgeport Music, Inc., or the “Blurred Lines” case, surprised a lot of people. It surprised the public, as many did not expect there to be infringement. It also surprised the litigants, because the jury’s special verdict form contained a logical inconsistency indicating that something had been decided incorrectly. However, the jury cannot be faulted for this inconsistency because it was tasked with deciphering the indecipherable. The fault lies in the way copyright law establishes infringement. This Note investigates the apparent circuit split in determining music copyright infringement and proposes that it is illusory. All circuits are attempting to do the same thing while using different language. The “different” tests used by each circuit all suffer from the same flaws: lack of a definition for “musical idea” and “musical expression” and the inability to pinpoint how “substantial” substantial similarity is. Given the complicated nature of music, tinkering with the tests or establishing definitions is futile. The change should focus on the trier of fact who applies the test. Juries composed of musicians should decide whether there is infringement in music copyright cases by balancing the interest of the plaintiff artist in owning the allegedly protected expression and the interest of the music community as a whole in using and building upon the allegedly protected expression. This process will ensure that music copyright’s goal of benefitting the public is pursued with the most deliberate of intentions.

TABLE OF CONTENTS

I.	INTRODUCTION	909
II.	COPYRIGHT: CONSTITUTIONAL BASIS, PURPOSE, AND THE DEVELOPMENT OF MUSIC COPYRIGHT LAW	911

III.	INFRINGEMENT	915
	<i>A. Ownership of a Valid Copyright</i>	916
	<i>B. Copying of Constituent Elements of the Work that Are Original</i>	917
	1. Access and Probative Similarity	917
	2. Substantial Similarity: The Circuit Split	918
	<i>a. Second Circuit and Family: The Ordinary Observers</i>	919
	<i>b. Ninth Circuit and Family: Extrinsic/Intrinsic Analysis</i>	921
	<i>c. Others</i>	922
IV.	BLURRED LINES.....	924
	<i>A. The Verdict's Problems and Why They Should Have Been Expected</i>	924
	<i>B. Industry Problems</i>	926
V.	CHANGING THE LAW: THE MUSICAL JURY	929
	<i>A. Other Solutions</i>	929
	<i>B. Musical Juries</i>	931
VI.	CONCLUSION	933

[Gaye Counsel] Q: Okay. Do you believe it's simply coincidental that these two have the spoken section that begin at the exact same bar and the exact same measure and end at the exact same bar and the exact same measure?

[Robin Thicke] A: Yes, it is coincidental.

Q: Do you know of any other song in the world ever created in the history of music after—that has a spoken section deviating from the rest of the song that begins at the same exact same bar and the same exact measure as “Got [t]o Give It Up” and “Blurred Lines”?

A: Just about every song on the radio.

...

Q: Can you name one, please?

...

A: Let's say “Give It to Me.”

Q: By whom?

A: Robin Thicke.¹

1. Reporter's Tr. of Day Two of Trial Proceedings, Morning Session at 76–77, Williams v. Bridgeport Music, Inc., No. 2:13-CV-06004-JAK-AGR (C.D. Cal. Feb. 25, 2015), ECF No. 349 [hereinafter Day 2 Morning Transcript].

I. INTRODUCTION

“Blurred Lines” garnered a lot of attention. The artists that produced the song are well-known: Robin Thicke is a renowned R&B artist,² Pharrell Williams is a Grammy-winning music producer,³ and Clifford “T.I.” Harris is an acclaimed rap artist.⁴ The music video was provocative, receiving approximately 440 million views on YouTube.com to date.⁵ The song was even scrutinized for implicating socially unbecoming behavior.⁶

The family of the late Marvin Gaye believed that “Blurred Lines” infringed Gaye’s “Got to Give It Up.”⁷ In 2013, they sued Thicke, Williams, and Harris, and ultimately the jury decided that “Blurred Lines” *did* infringe “Got to Give It Up.”⁸

Music copyright law regulates how much a new work may copy an older work.⁹ It states that too much copying gives rise to liability for infringement, but it is careful to permit some copying so that new works can meaningfully build on older works.¹⁰ The “Blurred Lines” trial showcased copyright law’s struggle in locating this threshold of efficient creativity. The opening quotation captures more than the comically shaded tension that pervaded the trial; it shows that Robin Thicke, as an artist, believes the threshold of efficient creativity should be located at a place that does not allow an artist to own the placement of a “spoken section” within a song.

The difficulty in locating this threshold is not unique to the Ninth Circuit, the circuit through which most of the case proceeded.¹¹ Every circuit has struggled with locating this threshold and has

2. *Robin Thicke Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/robin-thicke-21209847> [<https://perma.cc/DF4D-VTAQ>].

3. *Pharrell Williams Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/pharrell-williams> [<https://perma.cc/AM9P-WU87>].

4. *Hip-Hop Star & Actor T.I.*, PEOPLE (Apr. 24, 2006), <http://www.people.com/people/archive/article/0,,20059205,00.html> [<https://perma.cc/P465-8TSA>].

5. Robin Thicke, *Robin Thicke—Blurred Lines ft. T.I., Pharrell*, YOUTUBE (Mar. 20, 2013), <https://www.youtube.com/watch?v=yyDUC1LUXSU> [<https://perma.cc/TC23-UKZK>]; Reporter’s Tr. of Day Two of Trial Proceedings—P.M. Session at 46–47, *Williams v. Bridgeport Music, Inc.*, No. 2:13-CV-06004-JAK-AGR (C.D. Cal. Feb. 25, 2015), ECF No. 332 [hereinafter Day 2 Afternoon Transcript].

6. Dorian Lynskey, *Blurred Lines: The Most Controversial Song of the Decade*, THE GUARDIAN (Nov. 13, 2013, 2:32 PM), <http://www.theguardian.com/music/2013/nov/13/blurred-lines-most-controversial-song-decade> [<https://perma.cc/UUV5-VPRY>].

7. *See generally* Day 2 Morning Transcript.

8. *See generally* Special Verdict, *Williams v. Bridgeport Music, Inc.*, No. 2:13-CV-06004-JAK-AGR (C.D. Cal. Mar. 10, 2015), ECF No. 320 [hereinafter Special Verdict].

9. 17 U.S.C. § 101 *et seq.* (2012).

10. B. MacPaul Stanfield, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 DRAKE L. REV. 489, 493 (2001).

11. *See infra* Part III.B.2.

developed or adopted a test in hopes that the test would yield accurate decisions.¹² The problem is that all of the tests do the same thing under the guise of different terminology.¹³ Because of this, each circuit lacks a definition for “musical idea” and “musical expression,” and none define when the similarity between two songs is substantial enough to infer that a defendant infringed.¹⁴ Furthermore, they all employ the same method to find substantial similarity: juries composed of lay people decide.¹⁵

The problem with sending the issues to a lay jury is that a lay jury in a music copyright infringement case does not have a requisite understanding of music to be able to decide the issues presented.¹⁶ This leads to less accurate trial verdicts, which is a concern in *Williams v. Bridgeport Music, Inc.* (the “Blurred Lines” case) since the verdict form contained logical inconsistencies suggesting that infringement was decided incorrectly.¹⁷ Inaccurate verdicts mean either that artists can copy too much from other artists or cannot copy enough, both of which frustrate creative development in the music industry. For example, not being able to copy enough from other artists—without being liable for infringement—may create a chilling effect that discourages artists from creating music. It may also encourage monopolistic behavior where artists attempt to own collections of sounds that may one day become popular. A chilling effect is undesirable because it would sift out useful musical progression. Monopolistic behavior of this kind is undesirable because the focus of artists would be on reserving sounds solely for future profit rather than building on other artists’ sounds. Preventing these problems is of singular importance since music permeates our society in a number of aspects¹⁸: film, videogames, television, religious worship, birthday parties, weddings, advertisements, sports, and more. A decrease in the quality of music is arguably a decrease in the quality of life; therefore, it is imperative that the law protects the incentives that foster its growth.

12. *Id.*

13. *See, e.g.,* Douglas YBarbo, *On the Legal Standard for Copyright Infringement*, 1999 UCLA J.L. & TECH. 3, 18 (1999) (“If the Second and Ninth Circuit standards are in fact identical, then their disparate vernacular and structure needs to be reconciled.”).

14. *See infra* Part III.B.2.

15. *Id.*

16. *See infra* Part IV.A.

17. *See* Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 280 (2013).

18. J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 423 (2004).

Part II of this Note establishes the constitutional basis for copyright law, the goal of copyright law, and the interests it balances to achieve that goal. Part III describes the elements of an infringement claim, reviews the circuit split on substantial similarity, and shows why the split is illusory and all tests are equally unhelpful. Part IV explains the "Blurred Lines" trial and verdict problems, the complexities of music that lay jurors face in deciding music copyright infringement cases, and the reverberating effects of the "Blurred Lines" verdict on the music industry. Part V suggests that juries in all music copyright infringement cases be composed of musical artists, investigates the benefits of using such a jury, and compares this solution to other proposed solutions.

II. COPYRIGHT: CONSTITUTIONAL BASIS, PURPOSE, AND THE DEVELOPMENT OF MUSIC COPYRIGHT LAW

Copyright law is an effectuation of language in the US Constitution, which states: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁹ Congress exercised this power by promulgating the Copyright Acts of 1790, 1909, and 1976.²⁰ Under the current Act of 1976, copyright protection exists for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."²¹

Even though copyright law protects an author's copyrightable works, the goal of copyright law is to benefit the public.²² It achieves this goal by balancing the author's interest in benefiting from her own work and other authors' interests in building on that work.²³ In practice, this means allowing one artist to briefly own her original expression of ideas while allowing other artists to freely copy the ideas themselves with impunity.²⁴ Through this process, the public freely

19. U.S. CONST. art. I, § 8, cl. 1, 8.

20. See generally Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 VAND. J. ENT. & TECH. L. 1, 6 (2007) (discussing the differences between each Act and the problems the 1976 Act remedied).

21. 17 U.S.C. § 102(a) (2012).

22. Nicole K. Roodhuyzen, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J.L. & POL'Y 1375, 1379–80 (2007); B. MacPaul Stanfield, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 DRAKE L. REV. 489, 493 (2001).

23. Roodhuyzen, *supra* note 22, at 1380.

24. Stanfield, *supra* note 22, at 493.

benefits from the ideas that one author expressed as well as from further development of those ideas by other authors. The author who owns a copyright is incentivized to continue expressing ideas, knowing that she will benefit from her own work.²⁵ If this balance of interests is thrown off kilter, the public's benefit decreases. If artists do not benefit sufficiently from their own work, they will not work, which will result in fewer ideas upon which the artist community could build.²⁶ If an artist benefits too much from her work, meaning copyright law protects more of her work than it should, then the artist community is not left with enough material upon which to expound and develop the art. Therefore, "[w]hen elements of the copyright system hinder dissemination of copyrighted works without providing adequate benefits to the creators or distributors of works, those elements of the system should be eliminated."²⁷

Congress first gave effect to constitutional copyright language through the Copyright Act of 1790.²⁸ This Act prohibited the nonconsensual copying of maps, charts, and books.²⁹ Copyright first began regulating the music industry in 1831, when Congress added musical compositions to the list of copyrightable works.³⁰ At this time, technology limited the industry's fixation abilities to sheet music,³¹ limiting the extent of music copyright coverage.³² Human ingenuity eventually led to the creation of machines, such as the piano roll, that allowed for the reproduction of sheet music in another form.³³ This form differed from sheet music in that a musician no longer read a document that indicated which notes to play; a canister-like object rotated inside a piano, mechanically triggering notes by using

25. See Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 675 (2003).

26. Jennifer Understahl, *Copyright Infringement and Poetry: When is a Red Wheelbarrow the Red Wheelbarrow?*, 58 VAND. L. REV. 915, 920 (2005).

27. Loren, *supra* note 25, at 675–76.

28. Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 280 (1993). Copyright was first recognized in the United States in 1783 when the Colonial Congress passed a resolution recommending that states provide copyright protection to authors or publishers of new books. *Id.* at 279.

29. *Id.* at 280.

30. Copyright Act of 1790, ch. 16, 4 Stat. 436, 436 (1831) (current version at 17 U.S.C. § 102 (2012)); Loren, *supra* note 25, at 683.

31. Sheet music is a document containing written musical expressions that a musician interprets while playing an instrument. See *Sheet Music*, THEFREEDICTIONARY.COM., <http://www.thefreedictionary.com/sheet+music> [<https://perma.cc/6BLG-EVLP>].

32. See Loren, *supra* note 25, at 679; see also Jamie Lund, *Fixing Music Copyright*, 79 BROOK. L. REV. 61, 68 (2013).

33. Loren, *supra* note 25, at 680.

perforations in the canister that caused the piano's keys to sound.³⁴ Courts found this form different than sheet music because the piano rolls were component parts of the machine rather than copies of the musical composition, and thus held that piano rolls did not infringe the sheet music of musical composition copyrights.³⁵ Congress responded by overruling this interpretation and giving owners of musical composition copyrights the right to mechanical reproduction of their works.³⁶ This right encompasses piano roll technology, compact discs (CDs), cassettes, and anything that involves mechanically duplicating the audible sound discerned from the sheet music.³⁷

Congress made the right to mechanical reproduction compulsory, meaning that a copier was not required to obtain permission from the copyright's holder, but did need to pay royalties if the copier used the copyrighted work.³⁸ It did this in response to the concern of a music publishing company that amassed a monopolistic collection of musical composition copyrights, giving it an oppressive advantage in the field.³⁹ By allowing the compulsory license, Congress ameliorated this devastating effect. The compulsory license has a royalty rate provided by statute, which Congress modernizes periodically.⁴⁰

The technological progression of the late 1800s⁴¹ required additional copyright protection. Familiar names, such as Thomas Edison and Alexander Graham Bell, created devices that recorded audible music on physical mediums.⁴² Emile Berliner's later invention, the gramophone, recorded music on flat discs or records.⁴³ Congress protected this new form by creating the sound recording copyright in the Sound Recording Act of 1971.⁴⁴ This sound recording copyright is separate and distinct from the musical composition copyright: while the latter covers musical characteristics found in a typical piece of sheet music, such as melody, harmony, rhythm, and

34. *Id.*

35. *Id.*

36. *Id.* at 681.

37. *See id.*

38. *Id.* When one copies and distributes another's musical composition for profit, a percentage of that profit must be paid to the owner of the musical composition copyright; this percentage is the royalty. *See, e.g.*, 17 U.S.C. § 115(c).

39. Loren, *supra* note 25, at 680–83.

40. *See id.* at 681.

41. Keyes, *supra* note 18, at 414.

42. *Id.*

43. *Id.*

44. Lund, *supra* note 32, at 68.

lyrics,⁴⁵ the sound recording copyright protects the sounds fixed in a phonorecord,⁴⁶ such as tempo, instrumentation, key, and style.⁴⁷ Another distinction between these two copyrights is that the sound recording copyright only protects the exact replications of earlier recordings, such that others may make “sound-alikes.”⁴⁸ The practical benefit of creating this distinction was recognition of specialization: some artists were solely composers, and some were solely performers.⁴⁹ Generally, a composer owns a work’s musical composition copyright, whereas a performer (typically a record label) owns the sound recording copyright.⁵⁰ Therefore, if a music performer made a sound recording of a composition that included additional expressive elements that were both original to that sound recording and that satisfied the Copyright Act’s “modicum of creativity” requirement, she would own a copyright over all of that new and original creative expression.⁵¹

In 1995, Congress added a digital performance right to the sound recording copyright.⁵² Congress added this right in response to pressure from the music industry concerning pay-per-view-type services that threatened the sale of CDs.⁵³ Notably, though, the right that Congress added was limited: it protected digital public performance of the sound recording, but not general public performance (playing a song over speakers in an auditorium).⁵⁴ The result was that the holder of a sound recording copyright could sue for infringement in the first case, but only the holder of a musical composition copyright (which comes with general public performance rights) could sue for the latter.⁵⁵

Greater technological innovation ensured that a CD purchase was not the only method to acquire music. Music could be transferred

45. *Id.* at 66.

46. “Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. 17 U.S.C. § 101. The term “phonorecords” includes the material object in which the sounds are first fixed. *See also id.*

47. Lund, *supra* note 32, at 67.

48. *Id.* at 70.

49. *Id.* at 67–68.

50. *Id.* at 69; Loren, *supra* note 25, at 686 (“[C]opyrights in sound recordings are typically owned by the record labels . . .”).

51. Lund, *supra* note 32, at 70.

52. Loren, *supra* note 25, at 687.

53. *Id.* at 688.

54. *Id.*

55. *Id.* at 688, 722 n.67.

through computer files between consumers.⁵⁶ However, holders of sound recording copyrights feared that they would lose royalties, which were granted via compulsory mechanical composition copyright.⁵⁷ Congress thus extended to holders of sound recording copyrights the right to receive compulsory royalties for the digital reproduction of their works through downloading as well as the mechanical reproduction of their works.⁵⁸

III. INFRINGEMENT

The essential elements of a copyright infringement claim are (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original.⁵⁹ A plaintiff must prove infringement by a preponderance of the evidence.⁶⁰ However, some circuits allow strong proof of substantial similarity to compensate for weak proof of access.⁶¹ No circuit allows strong proof of access to compensate for weak proof of substantial similarity.

The defendant in a music copyright suit may marshal several defenses. In addition to statute of limitations and laches, a defendant may attack the validity of the copyright, demonstrate misuse of the copyright, or allege estoppel, fair use, or unclean hands.⁶² Two additional defenses, somewhat related, are prior common source and independent creation.⁶³ The prior common source defense states that the similarities between the alleged infringer and the copyright holder exist in a prior work, making the similarities in the at-issue works unoriginal, not copyrightable, and not infringeable.⁶⁴ The defense of independent creation means that an infringement action will not succeed because the second element of the plaintiff's prima facie case—that the defendant *copied* the plaintiff—is not satisfied because the similarities are the result of coincidence rather than copying.⁶⁵ Copyright infringement is a strict liability tort, resulting in liability

56. *Id.* at 690.

57. *Id.* at 689.

58. *Id.*

59. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); Marc K. Temin, *The Irrelevance of Creativity: Feist's Wrong Turn and the Scope of Copyright Protection for Factual Works*, 111 PENN ST. L. REV. 263, 264 (2006).

60. 18 C.J.S. *Copyrights* § 117 (2015).

61. *See generally* David Aronoff, *Exploding the "Inverse Ratio Rule,"* 55 J. COPYRIGHT SOC'Y U.S.A. 125 (2008).

62. 18 AM. JUR. 2D *Copyright and Literary Property* §§ 262–68.

63. *Id.* at §§ 264–65.

64. *Id.* at § 265.

65. *Id.* at § 264.

for even subconscious copying of another's work.⁶⁶ Unintentional copying is innocent infringement and therefore is *not* a defense to an infringement claim.⁶⁷ But liability for innocent infringement may result in a defendant paying fewer damages than liability for willful infringement.

A. Ownership of a Valid Copyright

Copyright protection exists for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁶⁸ In order to prove ownership of a valid copyright, the plaintiff must prove that the plaintiff's work was original and copyrightable and that plaintiff complied with statutory formalities.⁶⁹ A copyright registered within five years of the first publication creates a rebuttable presumption that plaintiff owns a valid copyright.⁷⁰ To rebut the presumption of originality, a defendant must show either that the work was not created by the plaintiff or the work did not possess a minimal degree of creativity.⁷¹ Showing that plaintiff's work is an idea rather than the expression of an idea, for example, would rebut the presumption that the work was copyrightable.⁷² This element of the infringement claim is not frequently the battlefield of litigation.⁷³

66. Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 477 (2007); Christopher Brett Jaeger, "Does That Sound Familiar?": *Creators' Liability for Unconscious Copyright Infringement*, 61 VAND. L. REV. 1903, 1905 (2008) (arguing that liability for subconscious copying is not conducive to the purpose of copyright law); see *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482–85 (9th Cir. 2000) (finding Bolton liable for subconscious copying).

67. Colin Conerton, Note, *Update Needed? Digital Downloaders and the Innocent Infringer Defense*, 8 WASH. J.L. TECH. & ARTS 587, 591 (2013) (explaining that the defendant's state of mind in a copyright infringement suit is not relevant to liability but is relevant to damages).

68. 17 U.S.C. § 102(a) (2012).

69. 18 AM. JUR. 2D *Copyright and Literary Property* § 254.

70. 17 U.S.C. § 410(e).

71. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

72. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) ("No author may copyright his ideas or the facts he narrates.").

73. Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 DEPAUL-LCA J. ART & ENT. L. & POL'Y 43, 45 (1995).

B. Copying of Constituent Elements of the Work that Are Original

Because plaintiffs rarely have direct proof that the defendant copied the plaintiff's work,⁷⁴ the second element of the infringement claim is often proved by circumstantial evidence of access and probative similarity to plaintiff's work and substantial similarity to plaintiff's work.⁷⁵

1. Access and Probative Similarity

Access means the defendant had an opportunity to view or hear the plaintiff's work.⁷⁶ The plaintiff need not show that the defendant actually viewed or heard the plaintiff's work.⁷⁷ As discussed earlier, substantial similarity may compensate for weak evidence of access and essentially allow a plaintiff to succeed on an infringement claim by proving access by less than a preponderance of the evidence.⁷⁸ This is called the inverse ratio rule.⁷⁹ Substantial similarity strong enough to compensate for access and lead to an inference of infringement is referred to as striking similarity.⁸⁰ Two clarifications in this regard bear emphasis. First, access is a necessity of infringement: one cannot copy what one does not have.⁸¹ Therefore, the access requirement is not dispensed with when there is striking similarity—it is only softened.⁸² Second, even if there is striking similarity, a defendant can still prove there was no access to the plaintiff's work and that the similarities result from independent creation or a prior common source.⁸³

Along with access, courts will typically review works for probative similarity.⁸⁴ Probative similarity is a preliminary finding that the works are similar.⁸⁵ This similarity may exist in

74. William R. Coulson, *They're Playing Our Song! The Promise and the Perils of Music Copyright Litigation*, 13 J. MARSHALL REV. INTEL. PROP. L. 555, 560 (2014) (“[C]opiers are rarely caught red-handed.”).

75. See generally Eric Rogers, *Substantially Unfair: An Empirical Examination of Copyright Substantial Similarity Analysis Among the Federal Circuits*, 2013 MICH. ST. L. REV. 893, 902 (2013).

76. Broaddus, *supra* note 73, at 47.

77. *Id.*

78. *See id.* at 48.

79. *See generally* Aronoff, *supra* note 61.

80. Rogers, *supra* note 75, at 903.

81. Broaddus, *supra* note 73, at 47.

82. *See id.*

83. *Id.* at 49.

84. *See* Rogers, *supra* note 75, at 902.

85. *Id.*

copyrightable or non-copyrightable elements of the works.⁸⁶ Probative similarity is not substantial similarity;⁸⁷ it is a necessary, but not sufficient, condition of substantial similarity.⁸⁸ Thus, where there is no probative similarity, there is no need to inquire into substantial similarity.⁸⁹ This also means that any court necessarily believes there is probative similarity between the works if it inquires into substantial similarity.⁹⁰

2. Substantial Similarity: The Circuit Split

After access and probative similarity have raised a rebuttable presumption that the defendant infringed, the plaintiff must prove substantial similarity between the works to show that the defendant's presumed copying was to an "unfair degree" and therefore actionable under copyright law.⁹¹ Scholars have proposed several methods to show substantial similarity,⁹² and circuit courts have split on which method is best.⁹³ Most circuits have employed one of two dominant tests—the ordinary observer test or the extrinsic/intrinsic analysis—yet some have combined the two or even employed other tests.⁹⁴ A closer look at each test shows that each is the same in that each seeks to distinguish between "musical ideas" and "musical expressions" and each attempts to specify how "substantial" the similarities between two works must be before unfair copying may be presumed. Therefore, even though the "Blurred Lines" case worked through the Ninth Circuit, it is likely that the decision would not have changed through the application of a different circuit's test.

86. *See id.*

87. *See generally* Alan Latman, "Probative Similarity" As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1191 (1990).

88. *See* Rogers, *supra* note 75, at 902.

89. *See id.*

90. *See id.*

91. *Id.* at 903.

92. *See, e.g.,* Iyar Stav, *Musical Plagiarism: A True Challenge for the Copyright Law*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 14–18 (2014) (describing, among others, pattern tests, abstraction tests, and filtration tests as ways to determine substantial similarity).

93. John W. Gregory, *A Necessary Global Discussion for Improvements to U.S. Copyright Law on Music Sampling*, 15 GONZ. J. INT'L L. 4, 109 (2012).

94. Nicole K. Roodhuyzen, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J.L. & POL'Y 1375, 1385–86 (2007) ("[T]he Tenth Circuit uses the abstraction/filtration/comparison test and the Sixth Circuit and the D.C. Circuit use a variation of this test."); *see also* Francescatti v. Germanotta, No. 11 CV 5270, 2014 WL 2767231, at *7 (N.D. Ill. June 17, 2014).

a. Second Circuit and Family: The Ordinary Observers

Judge Learned Hand developed the conceptual framework for substantial similarity in *Nichols v. Universal Pictures Corp.*⁹⁵ In his infringement analysis, Judge Hand acknowledged that copyright infringement was not limited to situations in which the defendant exactly copied the plaintiff's work.⁹⁶ Therefore, he reasoned that there must be a substantiality requirement.⁹⁷ In order to analyze whether this substantiality requirement was met, Judge Hand developed an "abstractions test."⁹⁸ This test involved determining whether the elements of a work are more idea-like, and thus not copyrightable, or more expression-like, and thus copyrightable.⁹⁹ Substantial similarity between the expressions of the works meant the defendant illicitly copied the plaintiff's work.¹⁰⁰ Judge Hand explained that substantial similarity existed between two works if an ordinary observer would regard their appeal as the same, overlooking disparities unless the observer set out to detect them.¹⁰¹ Judge Hand did not believe expert testimony was to play a part in this analysis.¹⁰²

The Second Circuit attempted to implement Judge Hand's framework in its *Arnstein v. Porter* decision.¹⁰³ In *Arnstein*, the court announced a two-pronged test for substantial similarity requiring (1) proof that the defendant copied the plaintiff and (2) proof that the copying went so far as to constitute improper appropriation.¹⁰⁴ Within the first prong, access and probative similarity are used to prove that defendant copied.¹⁰⁵ Expert testimony is permissible under this prong.¹⁰⁶ If an inference of copying exists through satisfaction of the first prong, the jury is to decide whether the copying went so far as to constitute improper copying.¹⁰⁷ Within this prong, expert testimony is inappropriate.¹⁰⁸ The *Arnstein* court stated that the second prong

95. See Jones, *supra* note 28, at 283.

96. *Id.*

97. *Id.*

98. *Id.*

99. See *id.* at 283–84.

100. See *id.* at 283.

101. Rogers, *supra* note 75, at 904.

102. *Id.*

103. Jones, *supra* note 28, at 285.

104. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

105. See Jones, *supra* note 28, at 286; Alice J. Kim, *Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases*, 19 COLUM.-VLA J.L. & ARTS 109, 112–14 (1995).

106. *Arnstein*, 154 F.2d at 468.

107. *Id.*

108. *Id.*

examines “whether defendant took from plaintiff’s work so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”¹⁰⁹ This two-pronged inquiry became the Second Circuit’s “ordinary observer test.”¹¹⁰

The Second Circuit reformulated the test to create a “more discerning ordinary observer test.”¹¹¹ The reason for this reformulation was the possible inaccuracy of the regular ordinary observer test, which had no mechanism to prevent juries from finding that infringement was present where a defendant substantially copied unprotectable elements from the plaintiff’s work. The reformulated more discerning ordinary observer test suggests that the jury would gain an understanding of copyright law so that the only things considered in its analysis would be protectable elements of a work.¹¹² The First and Third Circuits’ tests are the same as the Second Circuit’s more discerning ordinary observer test.¹¹³

All ordinary observer courts require there to be access, probative similarity, and substantial similarity. They also all desire to prevent infringement findings from occurring where substantial similarity results from unprotected elements of a work. For the Second Circuit, it applies the more discerning ordinary observer test to filter out the unprotected expression in a work.¹¹⁴ The First and Third Circuits do the same.¹¹⁵ Therefore, all of the tests fall victim to the criticism that there is no definition for “musical idea,” which in turn means there is no definition for “musical expression.”¹¹⁶ Nor do any of the tests define how “substantial” substantial similarity actually is.¹¹⁷ The closest thing there is to making this determination, and one source of the illusory circuit split, is the variation among the circuits on whether substantial similarity should be assessed from the viewpoint of the intended audience. However, this relies on the fact that the intended audience has a better chance than an unintended audience at knowing when there is substantial similarity; it does not

109. *Id.* at 473.

110. *See* Rogers, *supra* note 75, at 904.

111. *Id.* at 905.

112. *Id.* at 904–05.

113. *See* Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 724 (2010).

114. Rogers, *supra* note 75, at 905.

115. *Id.* at 906–07.

116. Kim, *supra* note 105, at 118; *see generally* Jones, *supra* note 28.

117. *See* Douglas Y’Barbo, *On the Legal Standard for Copyright Infringement*, 1999 UCLA J.L. & TECH. 3, *17 (1991).

rely on the fact that the intended audience *knows* when there is substantial similarity.

b. Ninth Circuit and Family: Extrinsic/Intrinsic Analysis

Until 1977, the Ninth Circuit used the Second Circuit’s ordinary observer test.¹¹⁸ But in *Sid & Mary Krofft v. McDonald’s Corp.*, the Ninth Circuit developed a new test designed to embrace Judge Hand’s idea-expression dichotomy.¹¹⁹ This new test—commonly called the extrinsic/intrinsic analysis or the *Krofft* test—is a two-step process that begins with an extrinsic analysis.¹²⁰ The trier of fact first determines whether there is similarity between the ideas of the works at issue.¹²¹ This step requires analytical dissection¹²² of a work and expert testimony to separate the protectable and unprotectable elements of a work.¹²³ The second step, the intrinsic prong, analyzes whether there is similarity between the expressions of the works at issue.¹²⁴ This prong is subjective and asks whether the ordinary, reasonable person would find the “total concept and feel” of the works to be substantially similar.¹²⁵ To prevail under the extrinsic/intrinsic test, a plaintiff must show substantial similarity under both the extrinsic prong and the intrinsic prong.¹²⁶

The Eighth Circuit¹²⁷ and the Eleventh Circuit¹²⁸ both use the extrinsic/intrinsic test. The Fourth Circuit uses the extrinsic/intrinsic analysis from an intended audience perspective.¹²⁹ Accordingly, during the intrinsic analysis, it would consider the total concept and feel of the work from the viewpoint of the intended audience of the

118. Rogers, *supra* note 75, at 907.

119. Jones, *supra* note 28, at 290.

120. Order Regarding Pl’s and Counter-Def’s. Mot. for J. as a Matter of Law, *Williams v. Bridgeport Music, Inc.*, (No. LA CV13-06004 JAK (AGRx)), 2015 WL 4479500, at *21 [hereinafter JMOL Order].

121. Kim, *supra* note 105, at 114.

122. *Id.*

123. Nicholas R. Monlux, *An Invitation for Infringement: How the Ninth Circuit’s Extrinsic and Intrinsic Similarity Tests Encourage Infringement: An Analysis Using Reece v. Island Treasures Art Gallery*, 56 J. COPYRIGHT SOC’Y U.S.A. 543, 550 (2009).

124. Kim, *supra* note 105, at 114.

125. JMOL Order, *supra* note 120, at *21.

126. Rogers, *supra* note 75, at 908.

127. *Id.*

128. See, e.g., *Watt v. Butler*, 744 F. Supp. 2d 1315, 1322 (N.D. Ga. 2010) (“To establish substantial similarity, the plaintiff must satisfy an extrinsic as well as an intrinsic test.”), *aff’d*, 457 F. App’x 856 (11th Cir. 2012); *Lil’ Joe Wein Music, Inc. v. Jackson*, 245 F. App’x 873, 877 (11th Cir. 2007) (same).

129. See Kim, *supra* note 105, at 115–16.

work, rather than as an ordinary lay observer.¹³⁰ Tenth Circuit courts have also employed the extrinsic/intrinsic analysis.¹³¹ Although the Tenth Circuit has also adopted an abstraction/filtration/comparison test for infringement involving computer programs,¹³² it is unclear whether this test is applicable to arts, such as music.¹³³

Just like courts using the ordinary observer model, courts performing the extrinsic/intrinsic analysis require that there be access, probative similarity, and substantial similarity between the works to give rise to an inference of illicit copying. Because the extrinsic/intrinsic analysis explicitly employs the idea-expression dichotomy, it more clearly suffers from the lack of a definition for “musical idea” and “musical expression.” The criticism that lay listeners may not know exactly what substantial similarity is also remains applicable,¹³⁴ as does the incomplete solution of making a hypothetical member of the intended audience decide the question.

c. Others

The Sixth Circuit conducts a filtration/comparison test.¹³⁵ Under this test, the court first determines which parts of plaintiff’s work, if any, are protectable.¹³⁶ Then the court filters out the unprotectable elements so that only the protected elements are further considered under its infringement analysis.¹³⁷ This is the filtration prong.¹³⁸ Next, the court determines whether the allegedly infringing work is substantially similar to the protectable elements of the plaintiff’s work through comparison of the works.¹³⁹ This is the comparison prong, and the inquiry is assessed from the viewpoint of the lay observer.¹⁴⁰ The Fifth Circuit seems to be the same,¹⁴¹ though

130. Rogers, *supra* note 75, at 908–09.

131. See, e.g., *Cartier v. Jackson*, 59 F.3d 1046, 1049 (10th Cir. 1995).

132. Matthew J. Faust, *What Do We Do with a Doctrine Like Merger? A Look at the Imminent Collision of the DMCA and Idea/Expression Dichotomy*, 12 MARQ. INTELL. PROP. L. REV. 131, 140 (2008).

133. 2 THE LAW OF COPYRIGHT § 14:33.

134. See YBarbo, *supra* note 117, at *17.

135. Rogers, *supra* note 75, at 910.

136. See William A. Hall, *Copyright—Kohus v. Mariol: The Sixth Circuit Adopts Two-Step Test for Substantial Similarity in Copyright Infringement*, 34 U. MEM. L. REV. 995, 1007 (2004).

137. *Id.*

138. See Rogers, *supra* note 75, at 910.

139. Hall, *supra* note 136, at 1008.

140. *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 275 (6th Cir. 2009).

141. See *Batiste v. Najm*, 28 F. Supp. 3d 595, 610 (E.D. La. 2014) (explaining that the court will first “filter” out unprotectable elements and then compare them side-by-side).

scholars have labeled it as an ordinary observer circuit.¹⁴² The Fifth Circuit makes its comparison from the viewpoint of the works' intended audience.¹⁴³

The Seventh Circuit's test has been considered "somewhat nebulous" and confusing.¹⁴⁴ Scholars have labeled the Seventh Circuit as an ordinary observer court.¹⁴⁵ However, some Seventh Circuit courts have created a kinship between the Second and Ninth's tests, explaining that the Seventh Circuit test focuses more heavily on the intrinsic prong of the Ninth Circuit's test.¹⁴⁶ The Seventh Circuit itself recently declined to adopt any test, stating that the various tests are in "pseudo-conflict" and that any road requires plaintiff to show defendant's access and opportunity to copy plaintiff's work along with evidence that the two works share "enough unique features" to give rise to an inference of illicit copying.¹⁴⁷ Substantial similarity is determined from the viewpoint of the intended audience.¹⁴⁸ The Seventh Circuit does not use inverse ratio rule.¹⁴⁹

The DC Circuit alternates between the regular ordinary observer test and the filtration/comparison test.¹⁵⁰ It uses the ordinary observer test when all of the elements of a work are copyrightable, but it uses the filtration/comparison test when some of the elements of a work are not copyrightable.¹⁵¹

The filtration comparison test suffers from the same faults as the ordinary observer and extrinsic/intrinsic tests. The filtration prong lacks a definition for "musical idea" and "musical expression," making filtration a rough approximation at best. The comparison prong does not place an amount on "substantial" similarity. The Seventh Circuit appears to have seen this dilemma in its *Peters v. West* decision when it saw no need to announce which test it was applying since "outcomes do not appear to differ."¹⁵²

142. See generally Rogers, *supra* note 75; Roodhuyzen, *supra* note 22.

143. Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 357, 373–74 (5th Cir. 2004) *rev'd on other grounds*, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

144. Franciscatti v. Germanotta, No. 11 CV 5270, 2014 WL 2767231, at *8 (N.D. Ill. Jun. 17, 2014).

145. Rogers, *supra* note 75, at 923; Nicole K. Roodhuyzen, *supra* note 22, at 1396.

146. See generally Franciscatti, 2014 WL 2767231.

147. Peters v. West, 692 F.3d 629, 633–34 (7th Cir. 2012).

148. Rogers, *supra* note 75, at 910.

149. Franciscatti, 2014 WL 2767231, at *6.

150. Rogers, *supra* note 75, at 911.

151. *Id.*

152. Peters v. West, 692 F.3d 629, 633 (7th Cir. 2012).

IV. BLURRED LINES

The Gaye family sought to prove that Robin Thicke's "Blurred Lines" and "Love After War" infringed Marvin Gaye's "Got to Give It Up" and "After the Dance," respectively.¹⁵³ A non-exhaustive list of the opposition includes: Interscope Records; Pharrell Williams; Robin Thicke; and Clifford "T.I." Harris, Jr. (collectively, the Thicke Party).¹⁵⁴ Because the Gaye family also alleged that Thicke and Williams willfully infringed, the jury had to decide this issue in addition to infringement liability.¹⁵⁵ At the close of trial, the jury found Thicke and Williams liable for infringement.¹⁵⁶ Despite acquitting Harris and Interscope, the jury unintentionally implied that both of those parties were also liable for infringement.¹⁵⁷ While the reason for this mistake is unknown, the verdict, as rendered, is of questionable accuracy and has adversely affected the music industry and may frustrate the goal of copyright law.

A. The Verdict's Problems and Why They Should Have Been Expected

The jury's verdict was problematic for at least two reasons. First, the jury found that Williams and Thicke were liable for infringement, but that neither Harris nor Interscope were. Then, on a different part of the verdict form, the jury found that both Harris and Interscope committed innocent infringement.¹⁵⁸ Even though the jury previously stated on the verdict form that Harris and Interscope were not liable for infringement, its finding that they innocently infringed implies that they also committed infringement.¹⁵⁹ One might believe that the verdict form's subsequent inquiry regarding innocent infringement is meaningless since the jury had already stated that Harris and Interscope did not infringe, and either a "yes" or a "no" answer to the question of whether a party's infringement was innocent would be ambiguous and misleading. However, the jury had the option of leaving blank the answers that were inapplicable. In fact, it did just that on the verdict form used to record its decision that "Love

153. See generally Reporter's Tr. of Trial Proceedings Day One—P.M. Session at 24–25, *Williams v. Bridgeport Music, Inc.*, No. 2:13-CV-06004-JAK-AGR (C.D. Cal. Feb. 24, 2015), ECF No. 331 [hereinafter Day 1 Afternoon Transcript].

154. Special Verdict, *supra* note 8, at 1.

155. *Id.* at 3.

156. *Id.* at 1.

157. See *id.* at 1, 3–4.

158. *Id.* at 1.

159. *Supra* Part III ("Unintentional copying is innocent infringement and is *not* a defense to an infringement claim.").

After War" did not infringe "After the Dance."¹⁶⁰ On that form, the jury found that none of the Thicke Party infringed "After the Dance" and declined to answer all of the remaining questions.¹⁶¹

Second, the jury found that Harris was not liable for infringement even though it knew that Harris, Williams, and Thicke all owned percentages of the musical composition of "Blurred Lines."¹⁶² After the trial, the Gaye family filed a Motion for Declaratory Relief in which it asked the court to declare that Harris infringed or to render judgment that he infringed as a matter of law.¹⁶³ The Gaye family's argument was that the jury found Williams and Thicke liable for infringement because of the substantial similarity between the two songs, so any owner of the infringing song should also be liable for infringement.¹⁶⁴ In his post-trial order altering the jury's verdict, the judge agreed, stating, "Given the jury's conclusion that 'Blurred Lines' was an infringing work, [Harris was] necessarily liable for infringement as a matter of law."¹⁶⁵

These two problems with the jury's verdict call into question the verdict's accuracy. The first problem mentioned suggests that the jury believed one of two things. The jury may have believed that Thicke, Williams, and Harris all committed infringement, but liability should be imposed only on Thicke and Williams. This is consistent with the jury's admission that Harris infringed by finding him, inadvertently, liable for innocent infringement. Alternatively, the jury may have believed that Thicke, Williams, and Harris were all not liable for infringement, but that Thicke and Williams should bear liability anyway. Either way, it is unclear whether the jury actually believed that "Blurred Lines" infringed "Got to Give It Up."

As long as lay juries decide infringement questions, the accuracy of their verdicts will be in question, even without telling special verdict forms. "Of all the arts, music is perhaps the least tangible."¹⁶⁶ Music has been described as the most abstract of all the arts.¹⁶⁷ Social philosopher Theodor Adorno has described it as "at once completely enigmatic and totally evident. It cannot be solved, only its

160. Special Verdict, *supra* note 8, at 5–7.

161. *Id.*

162. Reporter's Tr. of Trial Proceedings Day 7—P.M. Session at 13, Williams v. Bridgeport Music, Inc., No. 2:13-CV-06004-JAK-AGR (C.D. Cal. Mar. 5, 2015), ECF No. 339 [hereinafter Day 7 Transcript].

163. JMOL Order, *supra* note 120, at *34–37.

164. *Id.* at *36.

165. *Id.* at *34–35.

166. *Wihtol v. Wells*, 231 F.2d 550, 552 (7th Cir. 1956).

167. *Keyes*, *supra* note 18, at 421.

form can be deciphered”¹⁶⁸ This is not a novel idea in the copyright world; scholars have identified various reasons why analyzing music infringement is such a difficult task. One reason is the difference in reading and hearing music.¹⁶⁹ Though two jurors may view the same written expression, the way they hear the nuances of that expression can vary enormously.¹⁷⁰ This phenomenon, resulting from individual “idiosyncrasies of the human brain and experience” and music’s neurological impact, imperils accurate findings of infringement.¹⁷¹

Another reason resides in the complexity of music itself.¹⁷² Every piece of music contains elements of “melody, harmony, . . . rhythm, . . . [t]imbre (tonal quality), tone, pitch, tempo, spatial organization, consonance, dissonance, phrasing, accents, note choice, combinations, interplay of instruments, . . . bass lines, and the new technological sounds.”¹⁷³ Since the aural musical sense of most individuals is undeveloped, only individuals with strong musical experience can make reliable music comparisons.¹⁷⁴ Even distinguishing between lay listeners of the intended audience of the music and lay listeners of an unintended audience can result in inaccurate verdicts.¹⁷⁵

B. Industry Problems

The possible inaccuracy of the “Blurred Lines” decision may negatively affect the music industry. First, the case has further obscured the concept of substantial similarity, leading to artist uncertainty about what they own. After the trial concluded, artists erred on the side of safety by giving writing credits out when they otherwise would not have.¹⁷⁶ This was especially true for R&B

168. *Id.*

169. Livingston & Urbinato, *supra* note 17, at 280.

170. *See id.*

171. *Id.*

172. Kim, *supra* note 105, at 124.

173. *Id.* at 124–25.

174. Michelle V. Francis, *Musical Copyright Infringement: The Replacement of Arnstein v. Porter—A More Comprehensive Use of Expert Testimony and the Implementation of an “Actual Audience” Test*, 17 PEPP. L. REV. 493, 500 (1990).

175. Paul M. Grinvalsky, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 395, 423 (1992) (“An unintended audience may find that the two works sound substantially alike where an intended audience may find the two works fall short of substantial similarity.”).

176. Blake Brittain, *Musicians More Careful After ‘Blurred Lines’ Case*, 90 PAT. TRADEMARK & COPYRIGHT J. 2228, at 23 (Sept. 16, 2015).

music.¹⁷⁷ Artist Jidenna gave writing credit to Iggy Azalea believing his hit "Classic Man" was too close to Azalea's "Fancy" to risk not giving credit.¹⁷⁸ Commenting on this decision, Jidenna told radio station Hot 97, "Ever since the decision of Robin Thicke and Pharrell, we believe that it was important to make sure that we are safe."¹⁷⁹

Further, the trial may stifle creativity in the industry.¹⁸⁰ Artists have already begun to pay precautionary royalties.¹⁸¹ An artist once invested his resources in the creation of a song that he anticipated would generate profit.¹⁸² However, factoring this additional expense alters the artist's economic justification for pursuing certain songs. Thus, where anticipated precautionary royalties drop a song below the artist's permissible profit level and the artist decides not to create the song, the music industry loses the creative contribution of that song and other songs that this initial song would influence. To the extent that the trial incentivizes greater creativity, this may also be too costly for artists to pursue. Artists recognize that music builds upon itself and that prior art informs the success of future art.¹⁸³ Creating music without a predecessor gives

177. *Id.*

178. *Id.*

179. *Id.*

180. Jones, *supra* note 28, at 281 ("[P]rohibiting the liberal borrowing of ideas would stifle the free flow of ideas necessary to facilitate true creativity."). Counsel for the Thicke party told Rolling Stone Magazine in an interview:

"I feel like I've let songwriters around the world down by helping establish this horrible precedent that somebody can make a claim based upon a song that sounds the same, yet is materially different—and if they can find eight people who don't read music, they might win," he says. When asked to explain why he feels that way, he says, "Record labels are going to be far more reticent to put out new, good music that is similar to the style of other music for fear that they are gonna get a claim, including spurious claims. I mean, why wouldn't anybody bring a claim now?"

Kory Grow, 'Blurred Lines' Artists 'Sleep Well Knowing They Didn't Copy,' ROLLING STONE (Mar. 12, 2015), <http://www.rollingstone.com/music/news/blurred-lines-artists-sleep-well-knowing-they-didnt-copy-20150312> [<https://perma.cc/3LNW-ZVF9>]. For another example of the music industry's concern for stifling creativity resulting from case law, see Matthew R. Brodin, Bridgeport Music, Inc. v. Dimension Films: *The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims—The Sixth Circuit's Flawed Attempt at a Bright-Line Rule*, 6 MINN. J.L. SCI. & TECH. 825, 826 (2005).

181. Brittain, *supra* note 176, at 1.

182. For a discussion on the profit incentives that copyright promotes for artists and authors, see generally Edward C. Wilde, *Replacing the Idea/Expression Metaphor with a Market-Based Analysis in Copyright Infringement Actions*, 16 WHITTIER L. REV. 793, 804–05 (1995).

183. Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. ENT. L.J. 717, 733 (1999) ("Popular music follows well-traveled roads.").

the artist no chance to assess its future success, possibly causing the cost of producing the song to outweigh the benefit.¹⁸⁴

These music industry effects impact music copyright law in a profound manner by distorting its incentive structure. Precautionary royalties have now caused artists to benefit economically from their own work and that of others. This undermines the idea that an artist should receive the credit for his own work, which implies that only that artist should receive such credit.¹⁸⁵ If artists interpret “Blurred Lines” as affording artists broader protection over the elements of their works, some artists might use this windfall as a method to increase profit margins by fixating works of questionable quality solely to preempt works that would infringe it later.¹⁸⁶ This change in focus places less emphasis on the artists creating quality music and more on the artist “trolling” quality music in an effort to claim sound without developing that sound in a progressive manner.¹⁸⁷

On the other end of the balance, the artist community may not be able to permissibly copy a sufficient amount of material from other artists’ works in order to build upon and progress the ideas they contain.¹⁸⁸ This may lead artists to be *more* creative in attempting to produce never-before-heard music, but it is unclear whether this would nevertheless promote the progression of music; artists would essentially be guessing at what unforeseen styles of music would be good with no guarantee that any would be. With one side of the balance engaging in monopolistic tendencies and the other side making new ideas rather than developing old ones, there will likely be a great deal of time and resources wasted in an inefficient manner. Public benefit is the chief concern of copyright law,¹⁸⁹ but it derives benefit neither from artists who do not actually want to make music nor from the inability of artists to build on the works of others.

184. “Music is an international language that has the capacity to bring together people from every corner of the world. It is also an economic engine, capable of yielding financial gain to those who own and control it.” *Johnson v. Gordon*, 409 F.3d 12, 14 (1st Cir. 2005).

185. Christopher Brett Jaeger, “Does That Sound Familiar?": *Creators' Liability for Unconscious Copyright Infringement*, 61 VAND. L. REV. 1903, 1909–10 (2008) (using a labor metaphor to show how copyright law protects artists’ ownership over their own work product).

186. Counsel for the Thicke Party told Rolling Stone, “The main misconception was what Pharrell said: ‘Silk and rayon feel exactly the same but are completely different materials’ The owner of rayon better have his eyes turned toward the owner of silk because if this decision really stands, he's going to get sued.” Grow, *supra* note 180.

187. See generally J.P. Mello, *Technology Licensing and Patent Trolls*, 12 B.U. J. SCI. & TECH. L. 388 (2006).

188. See Understahl, *supra* note 26, at 944.

189. *Id.* at 918.

V. CHANGING THE LAW: THE MUSICAL JURY

Some authors have advanced solutions to the problems that accompany tests for substantial similarity, but these solutions do not adequately address the root of the problem. The best solution is to replace the lay listener of juries with musical jurors. This will provide a more deliberate pursuit of the goal of copyright, and its intersection with existing solutions may provide the most benefit at the lowest cost.

A. Other Solutions

There have been a number of solutions proposed to remedy the difficulty of the jury's task in assessing substantial similarity.¹⁹⁰ One solution is a single, specialized copyright court that possesses nationwide jurisdiction.¹⁹¹ Landau and Biederman proposed this solution in response to "the lack of experience and familiarity with copyright issues on the part of federal district court judges coupled with the unpredictability and biases of juries, [which] leads to frustrating and contradictory results at the district court level."¹⁹² They assert that a single court that handles copyright litigation would be more knowledgeable of copyright law.¹⁹³ This solution also suggests that the intrinsic similarity test be applied by the court, rather than the jury, because the jury is less knowledgeable of copyright and because the composition of a lay jury can vary widely depending on jurisdiction, potentially leading to adverse results across jurisdictional boundaries.¹⁹⁴ Similarly, Roodhuyzen proposes that judges alone should decide issues of music copyright infringement with an eye toward the incentive structure underpinning copyright law.¹⁹⁵

The problem with these solutions is that judges, even if they are more experienced with copyright law than lay jurors, are not necessarily more experienced with music. Judges would therefore still have difficulty defining the relevant core terms for music copyright infringement, and verdicts of questionable accuracy would continue to loom in the law. Second, judges are not necessarily more

190. See Austin Padgett, Note, *The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation*, 7 PIERCE L. REV. 125, 138 (2008).

191. Landau & Biederman, *supra* note 183, at 719.

192. *Id.* at 737–38. *But see* Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303, 1354 (2012) (explaining that judges are vulnerable to biases just as jurors are).

193. See Landau & Biederman, *supra* note 183, at 719.

194. *Id.*

195. See generally Roodhuyzen, *supra* note 23.

knowledgeable than lay jurors of the proper balance of the incentive scheme that is the backbone of copyright law. Even if judges understand the rationale better, they will not know how “substantial” or “insubstantial” the similarity between two songs must be in order for other musical artists to be willing to continue creating music. If jury verdicts vary widely by jurisdiction, the correct remedy is not necessarily to stop the variance either. Consolidating music copyright to one court for one judge or a few judges to decide may mean that the verdicts are more predictable but nevertheless incorrect in the sense that there is still no guarantee that the proper incentive balance will be achieved.

Another solution replaces the lay listener of juries deciding musical composition infringement with other musical composers.¹⁹⁶ Lund proposed this after noting that the intended audience of musical compositions is different than the intended audience of sound recordings.¹⁹⁷ Where the intended audience of sound recordings is “anyone who listens to musical sound recordings,” the audience for musical compositions is “other musicians who are capable of performing” the music.¹⁹⁸ Because of the inability of most to read written music and the deficiencies in music comprehension of a lay listener, copyright infringement findings assessed by the lay listener would be less accurate.¹⁹⁹

One problem with Lund’s solution is that audiences change. Lund’s proposal was generated, in part, from a musical composer releasing sheet music as opposed to a sound recording on the market for fans’ enjoyment.²⁰⁰ Lund suggests that this indicated the intended audience was those who could read the music.²⁰¹ Though this may have been the case in that instance, a future composer may release a simple music composition to promote musical literacy. This would lead back to the problem of lay juries inadequately assessing substantial similarity. Second, Lund proposes that her solution applies only to musical composition copyright infringement cases.²⁰² Because the solution does not extend to sound recording copyright cases as well, it can only be a partial fix.

196. *See generally* Lund, *supra* note 32.

197. *Id.* at 63.

198. *Id.*

199. *Id.* at 63–64.

200. *Id.* at 61–62.

201. *Id.* at 63.

202. *See generally id.*

B. Musical Juries

Juries should be comprised of musical artists in music copyright infringement cases. Asking anyone other than artists to decide what parameters best incentivize artists by giving them the proxy tasks of defining abstract terms such as "musical idea" and "substantial similarity" is both counterintuitive and unproductive. These unresolvable questions are a means to an end: public benefit through balanced incentives. Instead of being preoccupied with the means, a musical jury would achieve the end. In contrast with Lund's proposal, this musical jury would be the *creator*, as opposed to the intended audience, and would decide music copyright infringement cases in lieu of any audience. Additionally, this Note's solution extends to sound recording copyright cases as well, providing a more holistic solution to the problem.

These jurors would have at least three qualities. First, they would be occupationally engaged in the music industry. Engagement in the music industry encompasses professions such as singers, songwriters, music producers and engineers, musical composers, and others who interact with music in a similar and direct capacity. Second, the jurors' engagements in the industry would be their primary endeavors. This could be measured by time spent in the music profession compared to time spent in jobs concurrently held or possibly by income. Third, the jurors would have worked in their professional engagements for at least a baseline number of years. These criteria will better ensure that the jurors deciding music copyright infringement cases are truly artists within the industry.

This solution would be congruent with the historical development of copyright law, where the music industry shaped many of the rights associated with the musical composition copyright and the sound recording copyright. For example, music industry activity spawned the development of the compulsory mechanical reproduction right for musical composition copyrights because Congress was concerned about music publishing companies maintaining monopolies on musical composition copyrights.²⁰³ The specialization of some artists as composers and others as performers was one reason for the creation of the sound recording copyright.²⁰⁴ It was the music industry's pressure that created the digital performance right for the sound recording copyright.²⁰⁵ It was also the music industry that

203. Loren, *supra* note 25, at 680–83.

204. Lund, *supra* note 32, at 67–68.

205. Loren, *supra* note 25, at 688.

prompted the addition of the digital reproduction right because of Congress's worry about royalty distributions.²⁰⁶

There may be concern that the individuals of a musical jury, with a greater stake than a lay jury in the issues it decides, would more likely succumb to self-serving interests. To illustrate this example, consider two artists. One artist is a deviant, tending to create works that significantly diverge from mainstream trends. Another artist is conservative, tending to create works that closely track mainstream trends. One might assume that the deviant artist would find infringement in more cases than the conservative artist in an effort to safeguard the deviant artist's future interests in prevailing as a plaintiff in an infringement suit. Likewise, one might assume that the conservative artist would find no infringement in an effort to safeguard her own interest in prevailing as the defendant in a later copyright infringement suit.

The response to this argument is twofold. First, because copyright law is to benefit the public, it is debatable whether artists have a greater stake in the decision of the case than lay jurors. Second, the artists of a musical jury deciding infringement will not have the knowledge necessary to further their self-interests. In John Rawls's *Justice as Fairness: A Restatement*, he describes the original position and its veil of ignorance as a method by which society may formulate the rules by which it is governed.²⁰⁷ In the original position, the individuals deciding society's rules are unaware of their race, wealth, religion, and any other status that may influence them to make a decision purely because they are self-serving.²⁰⁸ Because of this unawareness, Rawls described this original position as standing behind the veil of ignorance.²⁰⁹ In practice, Rawls's formulation of the veil and the original position was a thought experiment that would allow individuals with self-serving interests to disregard them.

In the same way, the jurors of a musical jury will decide cases of infringement from behind a veil of ignorance, without allowing their personal preferences to influence their decision. The difference between the jurors' veil of ignorance and Rawls's formulation is that the jurors' veil is not a thought experiment; it is real, and it is self-imposing. The most influential status of a musical juror—perhaps the only status—that could cause that juror to decide a present case based on self-interested motivations is that juror's identity in a future

206. *Id.* at 689.

207. *See generally* JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 15 (Erin Kelly ed., 2001).

208. *See id.* at 15.

209. *Id.*

infringement suit. However, it is unlikely that a musical juror deciding an infringement case would know whether she will sue or will be sued for infringement after deciding this case. Incorporating the deviant artist and the conservative artist, the deviant artist would not find infringement simply to safeguard his interests in being the plaintiff in a later suit; he could be the defendant. Likewise, the conservative artist would not absolve a party of liability for infringement to safeguard his interests in being defendant later; he could be the plaintiff. Because the veil is self-imposed, the logistics of actual imposition are of no concern, and the practical complications that surely would arise from enforcement need not be addressed. Thus, allowing the musical jury to prescribe the rules of infringement would more efficiently pursue the goal of copyright, while avoiding the improper influence of jurors' self-motivating desires.

VI. CONCLUSION

Music copyright law is complicated. It is essential not to lose sight of its purpose and the method by which it achieves that purpose. The purpose of music copyright law is to benefit the public by progressing music. It facilitates the progression of music by carefully balancing the interests of artists who want to benefit from the work they produce against the interests of all other artists who want to build upon created works. In an effort to balance these interests, copyright law allows artists to sue for copyright infringement and claim the benefits from their work to which they are rightfully entitled. The circuit courts have developed various tests to enforce copyright infringement, leading to an apparent split in the way infringement is decided. However, a closer look reveals that each circuit struggles with defining the same core terms that are used to facilitate findings of infringement. The same core terms were in flux in the "Blurred Lines" case, and the resulting jury verdict called into question its own accuracy. The "Blurred Lines" case demonstrates the impropriety of tasking a lay jury with the monumental task of deciding cases of music copyright infringement. Given the complex nature of music, lay juries should not be expected to provide accurate verdicts in music copyright cases. Instead, juries composed of musicians engaged in the music industry should decide issues of infringement. These juries are best not because they have more knowledge of music than the typical lay juror, but because they are the best actors at deciding what incentive structure best incentivizes

their own industry. Only with the proper incentive structure will the public benefit from the progression of the useful art of music.

*Jason Palmer**

* J.D. Candidate, 2017, Vanderbilt University Law School; B.A., 2013, College of William & Mary. I thank Tiffany Harris for her unwavering support while creating this work.